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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~27~~ 1

CASSIUS MARSELLUS CLAY, JR., also known as MUHAMMAD ALI,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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### Opinions Below

The opinion of the Court of Appeals is appended hereto at pages 1a-48a. The judgment and the order denying rehearing are appended hereto at page 49a. Petitioner having been convicted upon trial by jury, no District Court opinion exists, but that court's oral finding of a basis in fact for petitioner's classification is appended hereto at pages 50a-54a.

### Jurisdiction

Petitioner was convicted on June 20 and sentenced on June 21, 1967. The Court of Appeals affirmed the judgment on May 6, 1968. Petition for Rehearing or Rehearing en Banc was denied on June 6, 1968. The jurisdiction of this court is conferred by 28 U. S. C. § 1254(1).

## Questions Presented

1. Whether the systematic exclusion of Negroes from petitioner's selective service boards resulted in the invalidity of the system's induction order, requiring reversal of a conviction based upon his refusal to obey such order; and, additionally whether the Court of Appeals erred in:

   a. Rejecting the analogy between selective service boards and racially discriminatory juries, instead analogizing discriminatorily comprised boards with malapportioned state legislatures;

   b. Ruling that petitioner had to prove specific acts of racial prejudice directed against him in order to render the induction order invalid;

   c. Ruling that petitioner had not been wrongly denied the right to discover evidence and subpoena witnesses to prove specific acts of racial and other prejudice against him;

   d. Failing to find that petitioner had proved specific acts of racial prejudice directed against him;

   e. Ruling that any errors made by racially exclusive selective service boards were corrected by the presence of a Negro on the three-member Presidential Appeal Board.

2. Whether petitioner was denied constitutional due process and the fairness and justice required in selective service proceedings by statute and regulations in that:

   a. he was subjected to racial discrimination;

   b. his selective service file contained "no basis in fact" for the denial to him of a ministerial exemption;

c. he was wrongfully denied conscientious objector status due to: mistaken advice from the Department of Justice to the Appeal Board for the Western District of Kentucky (the "Kentucky Appeal Board"); the failure of the Texas Appeal Board to refer his case for advice to the Department of Justice; and the denial to him and the Kentucky Appeal Board of copies of the Hearing Officer's report to the Department of Justice.

3. Whether the inclusion in the selective service file of reams of letters and newspaper clippings of a prejudicial nature and the pre-final classification statements of the Chairman of the House Armed Services Committee and the National Director of Selective Service deprived him of rights to due process and fair and just proceedings as guaranteed by the due process clause, statutes, and regulations.

4. Whether the refusal of the Government to produce and the district court to require production of documentary and other evidence required the dismissal of the indictment.

5. Whether the selective service proceedings, the denial of civil remedies and the proceedings in the district court deprived petitioner of a judicial trial and constituted a bill of attainder or pains and penalties in violation of article I, § 9, cl. 3 of the Constitution of the United States.

## Constitutional and Statutory Provisions and Regulations Involved

1. The constitutional provisions involved are article I, § 9, cl. 3 and the first and fifth amendments and the equal protection and due process clauses of the fourteenth amend-

ment, the pertinent texts of which are set forth in the appendix hereto at pp. 55a-56a.

2. The statutory provisions involved are 50 U. S. C. App. §§ 451(c), 455(a), 456(g), 456(j), 460(b)(3) and 462(a) the pertinent texts of which are set forth in the appendix hereto at pp. 56a-62a.

3. The Regulations involved are 32 C. F. R. §§ 1600.735-1, 1600.735-2(a), 1604.1, 1604.6(b), 1604.11, 1604.12, 1604.21, 1604.22, 1604.24, 1604.25, 1604.52(a)-(c), 1604.54, 1604.55(a), 1622.1(b)-(d), 1622.14, 1622.43, 1622.60, 1624.1, 1625.2, 1626.23, 1626.24, 1626.25, 2627.1(a), 1627.3 the pertinent texts of which are set forth in the appendix hereto at pp. 63a-75a.

## Statement of the Case

Indicted on May 8, 1967, petitioner was convicted of violation 50 U. S. C. App. § 462 and, on June 21, 1967, was sentenced to five years' imprisonment and a $10,000 fine (R. 277-78).

As noted by the Court of Appeals petitioner " . . . exhausted every administrative remedy provided by Selective Service" and " . . . fully pursued his rights in the United States courts in a vain attempt to stop his induction before his trial and conviction in the present case" [1] (7a).

Petitioner contended that he was entitled under the fifth and fourteenth amendments, 50 U. S. C. App. §§ 451(c),

[1] For a review of the administrative proceedings herein see the opinion of the Court of Appeals pp. 1a-7a, appendix hereto. For a review of related and allied judicial proceedings in which appellant sought to obtain civil redress see *id.*, pp. 7a-11a.

455(a), 32 C. F. R. §§1600.735, 1604.22, 1604.25, 1604.52(c), and 1622.1(d) to be classified and otherwise subjected to the obligations of military service only by a selective service system from which Negroes had not been systematically excluded.

Although the constitution, statutes, and regulations seem to agree regarding racial discrimination, no Negro served on petitioner's Kentucky Local or Appeal Boards, and of 641 local board members in that state only 0.2% were Negroes. No Negro served on petitioner's Texas Local or Appeal Boards and of 656 local board members 1.1% were Negroes. The 1960 Kentucky and Texas state populations contained Negro populations of 7.1% and 12.4% respectively. Negroes comprised 21% of the total population of the city of Louisville, Kentucky and 19.81% of the population of Harris County, Texas. See opinion of the Court of Appeals, pp. 13a-14a appendix hereto.

In the District Court petitioner sought witnesses and documents to prove systematic exclusion of Negroes from the selective service system, specific instances of racial or other prejudice against him, the selective service system's improper consideration of extraneous and prejudicial matter and the denial to him of procedural due process by the local and appeal boards and their members (R. 331-429).

The Court of Appeals found no error in the District Court's refusal to allow petitioner to procure the desired proof on the ground that "[w]hat the defense actually sought was to place the Selective Service System itself on trial by a broad, general, though vague and indefinite in-

vestigation into its activities and procedures."[2] Opinion of the Court of Appeals, p. 27a, appendix hereto.

Petitioner was denied conscientious objector status by the Louisville Local Board and the Appeal Board for the Western District of Kentucky, although his beliefs were admittedly based on the teachings of the Lost Found Nation of Islam; those beliefs were said by the Department of Justice to, " . . . 'rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form.' " *Id.*, p. 37a.[3]

Although the Department of Justice Hearing Officer recommended that conscientious objector status be granted and petitioner requested that the Appeal Board not act until the report, *the very report referred to in the Department's advice letter*, had been made available, that was never done. Efforts to obtain the report in the District Court were successfully opposed by the Government (R. 390-94, 419-27, 470-72).

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[2] *Cf.* "Nowhere in the record in this case or in appellant's brief do we find any specific charge or evidence of discrimination against appellant because he is a Negro. . . . [W]e have been unable to find any evidence which shows in the slightest particular that the treatment accorded Clay (Ali) by any board or member thereof was different from that given to any other registrant." Opinion of the Court of Appeals, p. 23a, appendix hereto.

[3] The Battle of Armageddon and Theocratic War seem once again relevant. Cf. *Taffs* v. *United States*, 208 F. 2d 329 (8th Cir. 1953) *cert. denied*, 347 U. S. 928; *Sicurella* v. *United States*, 348 U. S. 385, 390-92 (1955). The beliefs of the Lost Found Nation of Islam and Jehovah's Witnesses seem parallel on these matters and the Department's recommendation was clearly in error.

Petitioner was denied a ministerial exemption (apparently because his income was derived from and a portion of his time—less than 10% according to the record—was devoted to professional boxing (Opinion, 33a-34a appendix)).

It is clear from the record that petitioner, who spent more than 90% of his time at his religious calling and who was "ordained" in keeping with the tradition, and by the leader of his sect, was, objectively, a minister as statutorily defined. There is absolutely no evidence to the contrary in the record.

His local board viewed hundreds of letters and newspaper articles which must have made the board members feel that they, themselves, were on trial. These letters and articles ranged from racial attacks to religious slurs to a questioning of the honesty of the board members.

## ARGUMENT

1. *A resume of the opinion of the Court of Appeals.* The court did " . . . not justify the failure to include substantial numbers of Negroes on [selective service] boards." Appendix, p. 17a. "The Selective Service System must not only be fair, it must likewise have the appearance of fairness," the court said. *Id.* "Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process." *Id.*

Acknowledging this the court then proceeded to sustain the conviction of a well-known Negro citizen sentenced to five years in prison and fined $10,000 for refusing to step forward pursuant to an induction order issued from an ad-

mittedly lily-white selective service system. While doing this the court compared the non-"representative" boards with malapportioned legislatures, *id.* at 19a; rejected the argument " . . . that composition of draft boards is similar to that of grand and petit juries," *id.*; said that " . . . nothing in the Constitution or the . . . Act requires racially proportionate selective service boards," *id.*;[4] held that the one-Negro three-member Presidential Appeal Board's review of the action of local and other boards cured all racial or other errors, *id.* at 21-23;[5] found no evidence of specific

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[4] Petitioner had merely contended that Negroes should not have been systematically excluded from these boards because of race. A similar contention has been made in other cases presently pending in the Fifth Circuit. These cases are: *Sellers* v. *United States*, No. 26,108; *Sellers* v. *McNamara*, No. 24,654; *Battiste* v. *United States*, No. 25,675; *Kemp* v. *United States*, No. 25,704; *Simmons* v. *United States*, No. 25,371; and *Nelloms* v. *United States*, No. 25,154. Each of these cases arose in the Northern District of Georgia. Additionally, *Du Vernay* v. *United States*, No. 24,132 (Feb. 7, 1968) *rehearing denied* May 14, 1968, *petition for cert. filed*, June, 1968, involved similar questions but was decided by the Court of Appeals on non-exhaustion grounds. In *Smith* v. *Leach*, No. 11,690 (three-judge court N. D. Ga.) a Negro registrant brought suit to oust the membership of Georgia's selective service boards attempting to utilize the remedy apparently suggested in *Du Vernay*, slip opinion at 10, n. 6. Smith having been inducted the District Court considered his suit a petition for writ of habeas corpus and, while the case was being held under advisement the Army advised the court that it intended to discharge the plaintiff, arguably mooting the case. *United States* v. *Brooks*, No. 18,679, involving the same issue, is pending in the Sixth Circuit. Counsel is informed that the issue is pending in courts in the Second and Ninth Circuits.

[5] *Cf.* the effect of the appointment of a Negro to membership on this Court. The right of Negroes to have fairly selected jurors to find facts in lower federal and state courts was certainly unaffected thereby. Local boards find facts and Appeals Boards review them from the records made locally. If the Presidential Appeal Board analyzes facts, as it is clearly the duty of this court "to analyze the facts in order that the appropriate enforcement of the federal right may be assured.". *Norris* v. *Alabama*, 294 U. S. 587, 590

discrimination, *id.* at 23;[6] and found nothing wrong with the denial to appellant of the right to procure such evidence, *id.* at 24-28.[7]

2. *This case should be viewed in the context of our history—a history of racial segregation in the armed forces. The lily-white selective service system is but an unconstitutional and statutorily prohibited remnant of our racially discriminatory past.*

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(1935). Although the conclusions of a state's highest court "are entitled to great respect . . . it becomes our [the Supreme Court's] solemn duty to make independent inquiry and determination of the disputed facts. . . ." *Pierre* v. *Louisiana*, 306 U. S. 354, 358 (1939). See also *Whitus* v. *Georgia*, 385 U. S. 545 (1967).

[6] See appendix at 48a, n. 23, dismissing the allegations of petitioner relating to prejudice against him. His lily-white boards in fact were placed on trial by letter writers many of whom referred to appellant and the board members using racial and religious epithets. The effect of these letters must have been far greater on their recipients than on judges, lawyers and other non-involved, non-recipient, readers not under attack. Of course, there were no doubt other pressures on the boards beyond the letters and the statements of newspaper columnists, General Hershey and Congressman Rivers.

[7] The Court of Appeal's approach to discovery under the liberalized F. R. Cr. P. 16(b) is at odds with this Court's pronouncement of its view of the proper approach under the new rule. *Compare* the opinion below: "The measure of discovery permitted by the Rules of Criminal Procedure is not intended to be as broad as in a civil case. . . . the rules . . . are far more restrictive governing criminal discovery." Appendix at 26a-27a; *with* ". . . the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. . . . favoring disclosure in criminal cases analogous to the civil practice." *Dennis* v. *United States*, 384 U. S. 855, 870-71 (1966). Certiorari is appropriate to squarely consider Rule 16(b)'s "broadening of criminal discovery." *Id.* at n. 17. "The amendment is so sweeping that cases decided under the rule as it stood prior to July 1, 1966, are no longer authoritative." 4 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 2031 (Supp. 1967).

At the beginning of World War II our completely segregated armed forces construed the Selective Service and Training Act of 1940, which forbade racial discrimination, to require merely "separate but equal" treatment. *Employment,* Report of the United States Commission on Civil Rights ("1961 Report") 45. " . . . [A]lmost total segregation continued in the Armed Forces throughout the war." *Id.* at 46.

On July 26, 1948, President Truman " . . . issued Executive Order 9981 to promote 'the highest standards of democracy' in the Armed Forces . . . [and provide] for equality of treatment and opportunity . . . without regard to race . . . . This policy shall be put into effect as rapidly as possible." *Id.* at 46-47. Integration without racial quotas was recommended in 1950. *Id.* at 47.

But President Truman's order would not apply to some military appendages. For example, " . . . where a segregated institution participates, [in R. O. T. C.] the student personnel are all of one race." *Id.* at 49. And, a Department of Defense spokesman has said "[w]here [segregation or discrimination] does occur in the National Guard, it is because of state law, while the National Guard is under the state's 'jurisdiction,'" *Id.* Despite this, the Commission on Civil Rights long before the riots in Watts recognized that an integrated National Guard, in times of racial tension " . . . would be reassuring to Negro citizens . . . observ[ing] that members of their race were on duty." 1961 Report at 51-52.[8] Regarding the reserves, the Commission on Civil Rights noted " . . . Negro participation is lower than in the regular Army." *Id.* at 52-53.

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[8] See also GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959) 358: "But many National Guard units still segregate or

Initial action to integrate the armed forces followed the issuance of *To Secure These Rights,* The Report of the President's Commission on Civil Rights (1947) where " . . . the record show[ed] that the members of several minorities, fighting and dying for the survival of the nation in which they met bitter prejudice, found that there was discrimination against them even as they fell in battle." *Id.* at 41. At the time of that report Negroes could enlist in the stewards branch of the Marine Corps only and the Army limited enlistments to a ceiling of ten percent of total strength. *Id.* In the Navy there were two Negro officers, in the Coast Guard one, in the Marine Corps none. *Id.* at 42. In the seventy-five years preceding that report West Point had admitted 37 Negro students, Annapolis six, and the Coast Guard Academy none. *Id.* at 43.[8] Regarding the National Guard most states had no Negro units and those which did (except three) required segregation by regulation. Of the states studied only two permitted racial integration. *Id.* See also Greenberg, *supra,* 362-64. In 1959, Greenberg noted:

> Does the government deny liberty without due process of law or equal protection of the laws when it segregates or discriminates against its soldiers? Or are the

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even refuse to admit Negroes. . . ." See also the REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) which noted at page 165: "In studying the relative performance of Army and National Guard forces in the Detroit disorder, we concluded that the higher percentage of Negroes in the Army forces contributed substantially to their better performance. As a result, last August, we recommended an increase in the percentage of Negroes in the National Guard." See also the topic, "Negro personnel in Guard units." *Id.* at 276.

[8] ". . . [A]s recently as 1940 there were only five Negro officers on active duty in the armed forces. . . ." GREENBERG, *supra,* at 356.

> armed forces immune from this constitutional requirement? During the Second World War and thereafter at least two suits were filed charging that discrimination in the armed forces was illegal, but they did not come to decision [footnote omitted]. As there is no real possibility that segregation will be reintroduced, there almost surely will never be a court decision on this issue with regard to the federal military. *Id.* at 357-58.

Draft boards presently have no known racial quotas established by or for them. *Id.* But this was not the case during World War II. In *United States ex rel. Lynn* v. *Downer,* 140 F. 2d 397 (2d Cir.), *cert. denied* 322 U. S. 756 (1944), *rehearing denied* 323 U. S. 817 (1945), the then existing selective service policy of racial quotas and segregated callups was attacked unsuccessfully. The two majority members of a Second Circuit panel then relied, at least in part, on *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), 140 F. 2d at 401. In petition for certiorari, counsel for the registrant pointed out that:

> It should be noted that in the last war, the Selective Draft Act of 1917 (50 U. S. C. A. App. Sec. 201) did not provide against discrimination. The purpose of that clause in the Act of 1940 was clearly to prevent officials who were administering the Act from making any differentiation based on race or color. Brief in Support of Petition for Certiorari at 11, *United States ex rel. Lynn* v. *Downer, supra.*
>
> *This case raises the question of discrimination in selection only.* Petitioner objects to selection by civilian boards under a separate Negro quota in the draft call. *Id.* at 19 (emphasis in original).

Of course, such a ruling post-1954 would be absolutely inconceivable. *Cf. Whitus* v. *Georgia,* 385 U. S. 545 (1967). The result sought by Judge Clark in his dissent in *Downer* must be today's law. And of paramount importance it should be noted that the Supreme Court's denial of certiorari in *Downer* was based " . . . *on the ground that the case is moot, it appearing that petitioner no longer is in respondent's custody* . . . ." 322 U. S. 756 (emphasis added).[10]

Every important fact in appellant's classification and induction process was presented to lily white selective service boards which disbelieved, ignored, or rejected each of petitioner's contentions, much as the all-white juries of the Deep South have done with Negro criminal defendants.[11]

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[10] Indeed, *cf.* the denial of certiorari in *Downer,* with the words of *Estep* v. *United States,* 327 U. S. 114, 121 (1946) "If a local board . . . classified a registrant . . . because he was . . . a Negro, it would act in the defiance of the law . . . . In all such cases its action would be lawless and beyond its jurisdiction." Petitioner reiterates that he was denied discovery and compulsory process as he sought to prove this fact.

[11] *Cf. Cassell* v. *Texas,* 339 U. S. 282, 289 (1950), where the fact that prospective jurors were selected on the basis of personal acquaintance was held to not correct the evil. Concerning the exercise of discretion by the local groups which suggest appointment to local and appeal boards, see *United States* v. *Mississippi,* 380 U. S. 128 (1965); and *Louisiana* v. *United States,* 380 U. S. 145 (1965). Discretion is at the heart of these state voting discrimination cases.

Appointments are made to local boards by the President "from recommendations made by the respective governors or comparable executive officials." 50 U. S. C. App. § 460(b)(3); 32 C. F. R. § 1604.52. As a practical matter, however, nomination by a governor is tantamount to appointment. See the statement of Hon. William F. Ryan (D., N. Y.), *Hearings before the Committee on Armed Services,* 89th Cong., 2d Sess. at 9919.

In Texas the names of nominees for local board membership are submitted to the Governor by a local committee (R. 159). *Cf.* the local jury commission system utilized by many Southern state courts for the selection of names of those to be included on jury rolls and lists.

There was no basis in fact for denial of either conscientious objector or ministerial status; the entire proceeding amounting to a bill of attainder or pains and penalties and the prejudicial matter contained in his file makes it doubly certain that petitioner was discriminated against. He was denied due process, procedurally.[12] And there was absolutely no evidence, "no basis in fact," upon which a conviction could be based. *Cf. Fields* v. *Fairfield,* 375 U. S. 248 (1963); *Garner* v. *Louisiana,* 368 U. S. 157 (1961); and *Thompson* v. *City of Louisville,* 362 U. S. 199 (1960).

The government by utilizing every technique at hand deprived appellant of access to material essential for his defense.

In *Dennis* v. *United States,* 384 U. S. 855 (1966) where criminal defendants were not allowed to view grand jury minutes for want of a particularized need the Supreme Court reversed saying:

> "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate [footnote omitted]. The trial judge's function in this respect is limited to deciding whether a

[12] Petitioner sought to prove the denial of procedural due process and equal protection unsuccessfully attempting to procure the minutes of meetings, the records of conversations between members of the Presidential Appeal Board and its executive director, other related intra-selective service system communications, the files of those granted ministerial exemption by the Louisville Local Board in 1966 and an unpublished regulation of the Department relating to conscientious objectors (R. 331-45, 381-82, 390-94).

case has been made for production, and to supervise the process . . . ." *Id.* at 874-75.

And,

> ". . . in the criminal field . . . it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free [footnote omitted]. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *United States* v. *Reynolds,* 345 U. S. 1, 12 (1953).

See also *Rosenberg* v. *United States,* 360 U. S. 367 (1959); *United States* v. *Coplon,* 185 F. 2d 629, 636-40 (2d Cir. 1950) (L. Hand, J.), *cert. denied* 342 U. S. 920 (1952); *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir. 1946); *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir. 1944); *United States* v. *Cotter,* 60 F. 2d 689, 692 (2d Cir. 1932); *Cf. Simmons* v. *United States,* 348 U. S. 397, 402-403 (1955) and *Gonzales* v. *United States,* 348 U. S. 407 (1955).

The decisions of the Second Circuit and of this Court demonstrate clearly that the Government cannot be allowed to enmesh a defendant in a procedural maze and then deny him the right to discover evidence, impeach witnesses and allow his counsel the factual tools with which to fashion his defense. This is doubly true when these defenses themselves by their very nature question the application of the power of the Government in a procedure which Congress and the Constitution require to be "fair and just."

Perhaps even more importantly the Department of Justice has effectively established a religion, discriminated between religions and religious beliefs.

Surely there can be no doubt regarding the religious nature of the beliefs of followers of the Lost Found Nation of Islam. For the Muslim movement has been recognized as a religious movement by the courts. See, *e.g.*, *Walker* v. *Blackwell,* 360 F. 2d 66, 68 (5th Cir. 1966); *Pierce* v. *LaVallee,* 293 F. 2d 233 (2d Cir. 1961); *United States* v. *Mohammed,* 288 F. 2d 236 (7th Cir. 1961), *cert. denied,* 368 U. S. 820 (1961); *Brown* v. *McGinnis,* 10 N. Y. 2d 531, 180 N. E. 2d 791 (1962).

Despite this recognition of the Muslim religion by the courts—surely the First Amendment requires no less than that—despite the sincerity of petitioner's beliefs as attested to by the Department's Hearing Officer, despite his recommendation that conscientious objector status be granted, the Department, in effect, ruled that beliefs of the Muslims were primarily political and racial, rather than religious. As the Department said:

> It is therefore our conclusion that registrant's claimed objections to participation in war *insofar as they are based upon the teachings of the Nation of Islam,* rest on grounds which primarily are political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form. However, only a general scruple against participation in war in any form can support an exemption as a conscientious objector under the Act. *United States* v.

*Kauten,* 133 F. 2d 703 (2d Cir. 1943). (Government Exh. No. 1 at 220, offered at R. 48, admitted at R. 139.)

> With due regard for the recommendation of the Hearing Officer, the Department of Justice finds that the registrant's conscientious objector claim is not sustained and recommends to your Board that he not be classified in Class 1-O or in Class 1-A-O. *Id.* at 225 (emphasis added).

Terming religious views "political and racial" is ancient practice not unknown in even the relatively modern South. For the presidential candidacy of Alfred E. Smith " . . . was final proof to millions of Protestants in the South, as in the rest of America, for that matter, that the Pope was plotting to seize the White House." Cash, *The Mind of the South,* 343 (1941). In that campaign Alabama's then senior Senator J. Thomas ("Cotton Tom") Helfin was said, perhaps apocryphally, to have charged from the stump: "The Pope is off the coast of Mobile in a submarine waiting to steam in and take over!" The administration of John F. Kennedy laid some Protestant fears to rest, but, in the Deep South's 1960 campaign against him the historic cry was almost paraphrased into "Scotch, Romanism, and Rebellion."

Indeed, as recently as 1948 South Carolina's Democratic Party adopted, then watered down, a primary voting prerequisite of belief in and support for " . . . the social, *religious* and educational separation of the races." Key, *Southern Politics,* 629-30 (1949) (emphasis added).

Nor are the Muslims the sole believers in racial-religious doctrine, if, indeed, that be the case. For "'[t]heories of

race were as much a part of Southern Baptist thinking as the Virgin Birth or the Second Coming,' one student declares" [footnote omitted]. Bailey, *Southern White Protestantism in the Twentieth Century* 6 (1964). And, of course, since prior to the time of Christ, anti-Semitism has persisted. Jews in and out of the South are constantly accused of being members of one political conspiracy or another, the currently popular one being a mystic alliance with Communists and integrationists with an occasional Catholic thrown in. As late as 1960 the Remember Mary Phagan Committee was organized in Atlanta to memorialize the woman around whose death the scaffolding of the *Leo Frank* case was constructed. A circular issued by the Committee claimed ". . . . the Jews are behind the Supreme Court's decision to destroy the white race." Golden, *A Little Girl Is Dead* 312 (1965).

The categorization by the Department of the nature of the beliefs of members of the Lost Found Nation of Islam is forbidden by the first and fifth amendments, the Act, and the regulations. For to allow men of a predominant race, religion and political persuasion to sit in judgment on the nature of another man's dissenting beliefs is to fly in the face of *United States* v. *Seeger,* 380 U. S. 163, 184 (1965), which said:

> The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. As Mr. Justice Douglas stated in *United States* v. *Ballard,* 322 U. S. 78, 86 (1944): "Men may believe what they

cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."

That the religious dissenter as well as the political dissenter is entitled to the full protection of the Constitution and the laws and regulations made under and pursuant to it is clear. For "[t]hose who begin *coercive elimination* of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 641 (1943).

In the Revolution 5000 Negroes including Crispus Attucks, " . . . perhaps the first American to die for freedom . . . " fought to make a United States. *Report of the National Advisory Commission on Civil Disorders,* 96 (1968). They fought, 186,000 strong, in segregated units of the Union Army for the freedom Mr. Lincoln offered. *Id.* at 98. In World War I more than 2,000,000 Negroes registered under the Selective Service Act. Approximately 360,000 entered the service in that war to make the world safe for democracy. *Id.* at 102. But, still in World War II "[t]he United States . . . fought racism in Europe with a segregated fighting force." *Id.* at 104.

Today it is the right of appellant to be treated on an equal basis with all other registrants. Whether he and others like him are to be so treated is an important question of federal law which has not been, but should be, settled by this court.[13] He seeks to avoid military service

[13] The Court of Appeals seems to have decided this question in a way in conflict with applicable decisions of this court, or has

on the same basis as white men of like or similar status or persuasion. For precisely this reason, this equal right, thousands of Negroes in America's armed forces have fought, been wounded, and died.

Despite changes made within the armed services themselves, the selective service system remains an anachronistic part of our discriminatory past. Indeed, as late as 1947 the government advertised for contract bids for racially segregated feeding of inductees. Greenberg, *supra,* at 359. And, of course, the exclusion of Negroes from the selective service system has been noted and condemned by both observers and participants including the President[14] and the National Advisory Commission on Selective Service. As the Court of Appeals in this case stated:

> The Selective Service System must not only be fair, it must likewise have the appearance of fairness. Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process. (Opinion, 17a, appendix.)

Having stated this, the Court then seems to have ignored its own words. The proceedings do not look fair; appellant contends they were not fair. He was a "Negro draftee." He was entitled to "be selected [or rejected] by a system

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sanctioned a departure therefrom which calls for an exercise of this court's power of supervision.

[14] See, *e.g., The President's Message to the Congress, March 6, 1967,* 3 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 386 (March 13, 1967) (Defendant's Exhibit 2, admitted at R. 163).

which gives Negro citizens a full participation . . . " even if he is a follower of the Muslim faith and the Heavyweight Champion of the World.

Respectfully submitted,

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